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4 UNITED STATES DISTRICT COURT  
5 EASTERN DISTRICT OF WASHINGTON

6 UNITED STATES OF AMERICA,

No. 1:11-CR-0121-LRS-1

7 Plaintiff/Respondent,

8 vs.  
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10 CHARLES LEE GILLENWATER, II,

11 Defendant/Petitioner.

**ORDER DENYING MOTION TO  
VACATE, SET ASIDE, OR  
CORRECT SENTENCE**

12 BEFORE THE COURT is Petitioner's *pro se* Motion to Vacate, Set Aside, or  
13 Correct Sentence pursuant to 28 U.S.C. § 2255 (ECF No. 361).  
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15 **I. BACKGROUND**

16 This matter arises from the conviction by jury trial of Petitioner Charles Lee  
17 Gillenwater. In August 2011, the Grand Jury returned an Indictment charging  
18 Gillenwater with two counts of Transmission of Threatening Interstate  
19 Communications to a government employee in violation of 18 U.S.C. § 875(c). The  
20 Government filed a Superseding Indictment adding a third count of Transmission of  
21 Threatening Communication by U.S. Mail in violation of 18 U.S.C. § 876(c). After  
22 the federal public defender moved to withdraw, the court appointed attorney Frank  
23 Cikutovich to represent Gillenwater.  
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1 In September 2011, then Chief Judge Rosanna Peterson ordered a  
2 psychological evaluation and a competency hearing. On January 6, 2012, a  
3 competency hearing was held where a disruptive outburst from Gillenwater  
4 prompted the court to remove him from the courtroom. On interlocutory appeal  
5 from the court's order declaring Gillenwater incompetent to stand trial, the Ninth  
6 Circuit Court of Appeals ruled that Gillenwater's constitutional right to testify at the  
7 competency hearing had been violated and remanded the matter for a new  
8 competency hearing. See *U.S. v. Gillenwater*, 717 F.3d 1070 (9<sup>th</sup> Cir.  
9 2013)(“*Gillenwater I*”).

13 On remand, the case was reassigned to the undersigned judge. On September  
14 24, 2013, the court determined that Gillenwater was not competent to stand trial and  
15 authorized involuntary medication with haloperidol decanoate pursuant to *Sell v.*  
16 *U.S.*, 539 U.S. 166 (2003). Gillenwater appealed the involuntary medication order  
17 and the Ninth Circuit affirmed the court's Order in *U.S. v. Gillenwater*, 749 F.3d  
18 1094 (9<sup>th</sup> Cir. 2014) (“*Gillenwater II*”). On December 15, 2014, the U.S. Supreme  
19 Court denied Gillenwater's pro se petition for rehearing.

23 On June 16, 2015, the court entered an Order declaring Gillenwater competent  
24 to stand trial. On June 30, 2015, Gillenwater was convicted of Counts 2 and 3 (a  
25 §875(c) and §876(c) violation). Gillenwater was sentenced to time served followed  
26 by a three-year term of supervised release. (ECF No. 331).

1           Gillenwater appealed his conviction claiming first that the 4-year pretrial  
2 delay violated his constitutional right to speedy trial and prejudiced his defense at  
3 sentencing and second, challenging the denial of his Rule 29 motion for acquittal.  
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5 The Ninth Circuit Court of Appeals rejected his arguments noting that the delay was  
6 “largely attributable to Gillenwater’s own appeals and the district court’s efforts to  
7 restore him to competency.” *U.S. v. Gillenwater*, 669 Fed.Appx. 844 (9<sup>th</sup> Cir., Oct.  
8 18, 2016)(“*Gillenwater III*”). Gillenwater petitioned the U.S. Supreme Court for writ  
9 of certiorari, but the petition was denied on February 27, 2017 and became final on  
10 that day. *Gonzalez v. Thaler*, 565 U.S. 134 (2012).  
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13           Gillenwater timely filed his § 2255 motion on April 10, 2017. 28 U.S .C. §  
14 2255(f)(1). He asserts at least 14 grounds under which he claims relief: (1)  
15 Defendant’s right to speedy trial under the Sixth Amendment was abridged; (2) the  
16 court was without jurisdiction to act upon “the first of many deprivations of  
17 fundamental...rights” (ECF No. 361-1 at 8; (3) 28 U.S.C. § 3161(h)(1)(a) is  
18 unconstitutional because authority has been “usurped from the impartial Jury”; (4)  
19 Local Rule 83.2(d) abridged the Defendant’s right of access to the court; (5) the  
20 court’s order directing the involuntary administration of antipsychotic medication  
21 violated the Conventions Against Torture, and 18 U.S.C. §2340 18 U.S.C. § 2340A,  
22 which are “unconstitutionally narrow”; (6) 18 U.S.C §875(c) and §876(c) are  
23 unconstitutional and violate due process because the law imposes “strict liability”  
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1 and “usurp[s] the domain of the impartial Jury” (ECF No. 361-1 at 10); (7)  
2 Petitioner’s right to speedy trial was violated when his pretrial incarceration  
3 exceeded 70 days without jury authorization; (8) the judge tampered with a witness  
4 by violating Defendant’s right to speedy trial and ordering forced medication; (9)  
5 deprivation of due process “in the absence of unanimous determination by an  
6 impartial Jury” (ECF No. 361-1 at 11); (10) the trial judge’s evidentiary ruling  
7 violated Federal Rule of Evidence 702 thereby violating Defendant’s constitutional  
8 rights; (11) improper delegation of discretionary power to the court usurping the  
9 right to an impartial trial by jury; (12) adverse evidentiary ruling violated the  
10 Defendant’s right to have a jury determine “relevancy and admissibility issues.” (13)  
11 ineffective assistance of counsel (asserting numerous grounds against pretrial, trial,  
12 and appellate counsel); and (14) Defendant is entitled to retrial due to the deprivation  
13 of constitutional rights.  
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## 19 **II. JURISDICTION AND LEGAL STANDARDS**

20 This court has jurisdiction by virtue of 28 U.S.C. § 2255.

### 21 *A. Custody Requirement*

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23 A petition for writ of habeas corpus under 28 U.S.C. § 2255 may only be filed  
24 by “[a] prisoner in custody.” The “in custody” requirement is jurisdictional in nature  
25 and applies at the time the petition is filed. *United States v. Reves*, 774 F.3d 562,  
26 564–65 (9th Cir. 2014). Although Gillenwater is no longer incarcerated,  
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1 Gillenwater is serving a term of Supervised Release which is set to expire on  
2 September 22, 2018. The Ninth Circuit has held that a federal defendant who is  
3 “subject to supervised release ... is in ‘custody’ ... [and] may seek relief pursuant to  
4 28 U.S.C. § 2255.” *Matus–Leva v. United States*, 287 F.3d 758, 761 (9th Cir.2002)  
5 (citing *Jones v. Cunningham*, 371 U.S. 236, 242–43, (1963)).  
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8 *B. Cognizable Claims and Preliminary Review*

9 Section 2255 allows a prisoner in federal custody to move the sentencing court  
10 to vacate, set aside or correct the sentence if he claims the right to be released upon  
11 any of the following four narrow grounds: 1) the sentence was imposed in violation  
12 of the Constitution or laws of the United States; 2) that the court was without  
13 jurisdiction to impose such sentence; 3) that the sentence was in excess of the  
14 maximum authorized by law; or 4) is otherwise subject to collateral attack. 28 U.S.C.  
15 § 2255(a). If there is no alleged lack of jurisdiction or constitutional error, there is  
16 no basis for collateral relief under § 2255 unless the error constituted a “fundamental  
17 defect which inherently results in a complete miscarriage of justice.” *Davis v. U.S.*,  
18 417 U.S. 333, 346 (1974)(quoting *Hill v. U.S.*, 368 U.S. 424, 428 (1962)).The burden  
19 is on the Petitioner to show his entitlement to relief under § 2255 including his  
20 entitlement to an evidentiary hearing.  
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26 The court notes that Petitioner has made an assertion of lack of jurisdiction in  
27 the underlying case. Such assertions do not deprive this court of jurisdiction to  
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1 adjudicate the § 2255 Motion as the statute enumerates jurisdiction for the very  
2 purpose of determining whether the trial court lacked jurisdiction.

3       The §2255 Motion is subject to preliminary review to determine whether an  
4 Answer or other response is required. Rule 4(b), Rules Governing § 2255  
5 Proceedings. A district court may deny a § 2255 motion without an evidentiary  
6 hearing if the movant's allegations, viewed against the record, either do not state a  
7 claim for relief or are so palpably incredible or patently frivolous as to warrant  
8 summary dismissal. *United States v. Burrows*, 872 F.2d 915, 917 (9th Cir. 1989). It  
9 is also well-settled that the law of the case doctrine precludes the reexamination of  
10 issues decided, either expressly or by necessary implication, in a previous appeal.  
11 *See United States v. Jingles*, 702 F.3d 494, 498 (9th Cir. 2012) (citing *In re Rainbow*  
12 *Magazine, Inc.*, 77 F.3d 278, 281 (9th Cir. 1996) (“[T]he decision of an appellate  
13 court on a legal issue must be followed in all subsequent proceedings in the same  
14 case”); *Odom v. United States*, 455 F.2d 159, 160 (9th Cir. 1972) (“The law in this  
15 circuit is clear that when a matter has been decided adversely on appeal from a  
16 conviction, it cannot be litigated again on a 2255 motion”) (some citations omitted)).

17       A petitioner “who is able to state facts showing a real possibility of  
18 constitutional error should survive Rule 4 review.” *Calderon v. United States Dist.*  
19 *Court*, 98 F.3d 1102, 1109 (9th Cir.1996) (Schroeder, C.J ., concurring) (referring  
20 to Rules Governing § 2254 Cases). “[I]t is the duty of the court to screen out  
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1 frivolous applications and eliminate the burden that would be placed on the  
2 respondent by ordering an unnecessary answer.” Advisory Committee Note (1976),  
3 Rule 4, Rules Governing § 2255 Proceedings (citing Advisory Note governing Rule  
4 4 in §2254 cases). The court has completed this review.

6 *C. No Right to Jury on § 2255 Motion*

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8 Rule 4 governing §2255 motions dictates that, absent unique circumstances,  
9 §2255 motions are properly assigned to the original sentencing judge. *See Farrow*  
10 *v. United States*, 580 F.2d 1339, 1348–51 (9th Cir. 1978)(en banc)(describing why  
11 there is no impropriety in this and its advantages); *King v. United States*, 576 F.2d  
12 432, 436–38 (2d Cir.), cert. denied, 439 U.S. 850 (1978).

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15 Petitioner’s Motion alleges that both the undersigned and the initially assigned  
16 judge deprived him of his fundamental rights and proceeded without jurisdiction. It  
17 further alleges that the court abused its discretion in failing to recognize the  
18 supremacy of constitutional rights over statutory law (ECF No. 361-1 at 22), and  
19 that a jury should “make a judgement of the appropriateness of the judges conduct.”  
20 (ECF No. 361-1 at 24).

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23 There is no right to a jury trial in habeas corpus proceedings. 28 U.S.C. §  
24 2243 provides that “the court shall summarily hear and determine the facts, and  
25 dispose of the matter as law and justice requires.” *See also*, 6A FED.PROC., L.ED.  
26 §41.105(Mar. 2017) (“No constitutional right to trial by jury exists because the  
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1 Seventh Amendment preserves trial by jury only insofar as that right was recognized  
2 by common law or by statute prior to the adoption of the Constitution, and habeas  
3 corpus issues had historically been tried to the court alone.”). Having presided over  
4 the trial and sentencing, this court has knowledge of the circumstances of this case.  
5 The court has an obligation to carefully review all habeas corpus proceedings and  
6 has “every reason to welcome the opportunity to correct any inadvertent aggravation  
7 of injustices” that provide grounds for relief to the habeas petitioner. *Farrow v. U.S.*,  
8 580 F.2d 1339, 1350 (9<sup>th</sup> Cir. 1978).  
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### 12 **III. DISCUSSION**

#### 13 *A. Claim One –Speedy Trial*

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15 Petitioner first asserts that he was unconstitutionally denied his right to speedy  
16 trial under the Sixth Amendment. He contends the Speedy Trial Act, 18 U.S.C. §  
17 3161(h)(1)(A)(excluding delay resulting from proceeding concerning mental  
18 competency), is unconstitutional as applied because it delegates discretionary  
19 authority to the court to toll speedy trial period in the absence of a “willful and  
20 knowing waiver or unanimous determination by an impartial jury.” (ECF No. 361 at  
21 4).  
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24 Petitioner already sought ruling on his constitutional right to speedy trial on  
25 direct appeal and the Ninth Circuit rejected the claim in *Gillenwater III*. Since  
26 review under § 2255 is not available to claims that have been previously rejected on  
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1 their merits on direct appeal, this claim is not reviewable. Although Gillenwater's  
2 appeal did not raise the constitutionality of § 3161(h)(1)(A), this analysis likewise  
3 would revert to the application of the constitutional speedy trial principles  
4 enunciated in *Barker v. Wingo*, 407 U.S. 514 (1972), which the Ninth Circuit has  
5 already concluded he failed to demonstrate. Accordingly, it would be superfluous  
6 for this court to address the contention that the Speedy Trial Act unconstitutionally  
7 accords discretion to the court. *See e.g., U.S. v. Bounos*, 730 F.2d 468, 471–472 (7th  
8 Cir. 1984); *see also, U.S. v. Brainer*, 691 F.2d 691, 699 (4<sup>th</sup> Cir. 1982)(holding the  
9 Speedy Trial Act constitutional both on its face and as applied and stating the  
10 possibility the Act would prevent the judiciary from accomplishing its  
11 constitutionally assigned functions “would appear remote.”).

#### 16 *B. Claim Two - Jurisdiction*

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18 Petitioner argues his conviction is void because the court lost jurisdiction  
19 when it deprived him of specific Constitutional rights citing “the moment that Judge  
20 Peterson denied the Defendant an opportunity to testify” at the initial competency  
21 hearing, the violation of his right to speedy trial, and the violation of due process and  
22 liberty interests by ordering the involuntary administration of medication. Petitioner  
23 relies upon *Johnson v. Zerbst*, 304 U.S. 458 (1938), a decision elaborating on the  
24 right to counsel to indigent defendants and the broadening of habeas corpus review  
25 to constitutional (non-jurisdictional) deficiencies. In nineteenth century habeas  
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1 corpus jurisprudence, the scope of habeas review was typically confined to  
2 determining whether or not the court had jurisdiction. *U.S. ex rel New v. Rumsfeld*,  
3 448 F.3d 403 (D.C. Cir. 2006)(explaining evolution of habeas review over time).  
4  
5 The *Johnson* Court held that jurisdiction, though present at the beginning of the trial,  
6 was “lost” in the course of trial by the failure to provide counsel for the accused.  
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8 The Court said that a violation of the Sixth Amendment “stands as a jurisdictional  
9 bar to a valid conviction and sentence.” Although the Court attached jurisdictional  
10 significance to the right to failure to appoint counsel, when the Court later expanded  
11 the availability of habeas relief to other constitutional violations, it did so without  
12 claiming that the denial of these rights by the trial court would have denied it  
13 jurisdiction. *See Custis v. U.S.*, 511 U.S. 485, 494-495 (1994)(explaining evolution  
14 of the habeas jurisprudence).  
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17         *Johnson's* jurisdictional requirements were not violated in this case as the  
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19 Petitioner was represented by counsel at trial. Moreover, the court unequivocally  
20 had jurisdiction when the Ninth Circuit remanded the matter with directions that the  
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22 Petitioner’s right to testify at the competency hearing be respected. A narrow  
23 examination of jurisdiction is unnecessary to consider whether the alleged  
24 constitutional claims have a basis in law and fact. Because the Ninth Circuit has  
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26 already found that Petitioner’s right to speedy trial was not violated and the court’s  
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1 involuntary medication order was constitutionally permissible under *Sell v. United*  
2 *States*, §2255 relief on these claims is precluded under the law of the case doctrine.

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4 *C. Claims Three and Seven – Speedy Trial Act*

5 Petitioner’s third claim argues that 28 U.S.C. § 3161(h)(1)(A) is  
6 unconstitutional “because it usurps the authority of the impartial Jury to deprive a  
7 Citizen’s fundamental right to speedy trial...” (ECF No. 361 at 7). His seventh claim  
8 contends the application of § 3161(h)(1)(A) “resulted in the criminal defendant’s  
9 detention exceeding 70 days,” thereby denying his constitutional speedy trial rights  
10 “without Jury authorization.” (ECF No. 361 at 11). For the reasons Claim One  
11 must be dismissed, so must Claims Three and Seven.  
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15 *D. Claim Four – Local Rule 83.2(d)*

16 Petitioner contends Local Rule 83.2.(d) is unconstitutional and its application  
17 resulted in the denial of his due process rights and the denial of his right to access  
18 the courts “for the purpose of accusing defense counsel of demanding \$10,000 in  
19 order to call the witnesses which the criminal defendant desired.” On January 18,  
20 2012, Judge Peterson entered an Order striking the *pro se* motions filed by the  
21 Defendant and reminding Defendant that the local rules prohibit a party from  
22 proceeding *pro se* once an attorney has appeared on that party’s behalf. (ECF No.  
23 97).  
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1 The cited Local Rule follows well established law that a criminal defendant  
2 has the constitutional right to either appear pro se or by counsel, but has no  
3 corresponding constitutional right to act as co-counsel on his own behalf. *U.S. v.*  
4 *Maxwell*, 778 F.3d 719 (8th Cir. 2015), cert. denied, 135 S. Ct. 2390 (2015) and cert.  
5 denied, 135 S. Ct. 2827 (2015) and cert. denied, 136 S. Ct. 176 (2015) and cert.  
6 denied, 136 S. Ct. 319 (2015); *U.S. v. Graham*, 682 F. Supp. 2d 286 (W.D. N.Y.  
7 2010), aff'd, 504 Fed. Appx. 63 (2d Cir. 2012), cert. denied, 134 S. Ct. 207 (2013).  
8 This protects the Sixth Amendment rights to counsel and to self-representation. This  
9 claim does not set forth an arguable error of constitutional magnitude which had an  
10 injurious effect on the proceedings.  
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15 *E. Claim Five – Involuntary Medication*

16 Petitioner contends the forced administration of medication constitutes torture  
17 under and violates the United Nations Conventions Against Torture (CAT) and the  
18 court in ordering the medication violates the Constitution by “committing a federal  
19 offense” under 18 U.S.C. §2340 and §2340A<sup>1</sup>. Petitioner’s claim fails to invoke a  
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23 <sup>1</sup> Section 2340A provides, “Whoever outside the United States commits or attempts  
24 to commit torture shall be fined under this title or imprisoned not more than 20 years,  
25 or both ....” 18 U.S.C. § 2340A. “Torture” is defined as “an act committed by a  
26 person acting under the color of law specifically intended to inflict severe physical  
27 or mental pain or suffering (other than pain or suffering incidental to lawful  
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1 constitutional provision and his claim involves the conditions of his pretrial  
2 detention, and therefore fails to state a cognizable claim. *See e.g., Badea v. Cox*,  
3 931 F.2d 573, 574 (9th Cir.1991) (habeas is the mechanism to challenge the legality  
4 or duration of confinement and civil rights action is proper method of challenging  
5 conditions of confinement). The CAT does not create private rights enforceable in  
6 §2255 proceedings. The U.S. Supreme Court has already made clear in *Sell v. United*  
7 *States*, 439 U.S. 166 (2003) that forced medication of an accused is constitutionally  
8 permissible in “limited circumstances.” *Sell*, 539 U.S. at 169. The *Sell* factors have  
9 already been reviewed by this court and the Ninth Circuit and were resolved against  
10 the Petitioner.  
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15 *F. Claim Six – 18 U.S.C. §§875(c) and 876*

16 Petitioner contends the statutes of conviction, 18 U.S.C. § 875(c) and §876(c)  
17 are unconstitutional because they “are structured in such a way as to impose...[s]trict  
18 [l]iability” which “usurp[s] the domain of the impartial [j]ury.” (ECF No. 361-1 at  
19 10). Although 875(c) contains no explicit *men rea* element, the statute is not  
20 presumed to establish a strict liability offense, because the “mere omission from [the  
21 statute] of any mention of intent will not be construed as eliminating that element  
22 from the crimes denounced.” *Morissette v. United States*, 342 U.S. 246, 263 (1952);  
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27 sanctions) upon another person within his custody or physical control.” 18 U.S.C. §  
28 2340 (emphasis added).

1 *see also, Elonis v. U.S.*, 135 S.Ct. 2001, 2009 (2015). The Ninth Circuit held in  
2 *United States v. Twine*, 853 F.2d 676 (9th Cir. 1988) that “we made it clear that §  
3 875(c) (and therefore § 876) did not define a strict liability offense.” 853 F.2d at 680.  
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5 Petitioner’s Motion does not state a basis in law for Claim Six.

6 *G. Claim Eight – Witness Tampering*  
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8 In Claim Eight, Petitioner repeats earlier asserted speedy trial and forced  
9 medication claims, and contends that by ordering the Defendant’s detention and  
10 medication, Chief Judge Peterson engaged in misconduct by witness tampering (of  
11 the Defendant) and committed an abuse of discretion. (ECF No. 361 at 12). The  
12 allegation of witness tampering, based upon the court’s rulings, is patently frivolous  
13 and cannot be the basis for habeas relief.  
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16 *H. Claims Nine, Eleven, and Twelve – “Usurpation of the Jury’s Domain”*  
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18 Petitioner contends in Claims Nine, Eleven, and Twelve that his right to due  
19 process was deprived by “usurpation of the Jury’s domain.” These claims  
20 incorporate the allegations of his other claims and adds the contention this court  
21 refused to allow the Defendant to call his desired witnesses and enter exculpatory  
22 evidence into the record. (ECF No. 361 at 12). It is Petitioner’s primary contention  
23 in this § 2255 Motion that *Marbury v. Madison* is being ignored and that the  
24 Constitution mandates that juries, not judges, make pretrial or evidentiary rulings  
25 that touch upon or impact fundamental rights. (ECF No. 361-1 at 22-24).  
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1 The phrase “usurping the province of the jury,” has been characterized as  
2 “empty rhetoric.” Notes of Advisory Committee on Federal Rules of Evidence, Rule  
3 704 (1972 proposed rules). See McElhaney, Expert Witnesses and the Federal Rules  
4 of Evidence, 28 Mercer L Rev 463, 472, n.45 (1977) (“‘Usurping the province of the  
5 jury’ is an unfortunate hyperbole, rightly derided.”). The judge and the jury each  
6 have very important and vital functions to perform. The heavy primary  
7 responsibility of safeguarding the fundamental rights and deciding questions of law  
8 rests on the trial court. The reliability and admissibility of evidence in a criminal  
9 case is at the forefront of a trial court’s gatekeeping role. In granting continuances  
10 and deciding competency issues, the judge is not usurping the function of the jury.  
11 These essential functions of a judge do not involve addressing the merits of the case  
12 and deciding what is truth, credibility, or guilt or innocence. Petitioner’s Motion  
13 fails to state any colorable basis for his claim that he was denied the right to jury  
14 trial.  
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20 *I. Claim Ten – Federal Rule of Evidence 702 and Fifth Amendment*

21 Claim Ten pertains to the court’s consideration of the testimony and report of  
22 defense witness Dr. C. Robert Cloninger at a pretrial evidentiary hearing on  
23 competency, when Cloninger had never examined Gillenwater. Petitioner contends  
24 the court’s consideration of the evidence violated Federal Rule of Evidence 702 and  
25 although the prosecutor objected, neither “the Judge nor Defense counsel rose to  
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1 challenge the admissibility of Dr. Cloninger's testimony." Claimed errors in the  
2 adequacy of evidentiary rulings are ordinarily not cognizable under § 2255. Such a  
3 claim, if cognizable under §2255, is so only if the allegation, if proved, would  
4 constitute a denial or infringement of a constitutional right or if it would result in a  
5 defect seriously affecting the fundamental fairness of the trial. Petitioner claims it  
6 infringed upon the Fifth Amendment privilege against self-incrimination. (ECF No.  
7 361-1 at 12). Petitioner fails to allege a colorable basis for a Fifth Amendment claim  
8 where the examination was occasioned by and used for the "neutral purpose of  
9 determining his competency to stand trial." *Estelle v. Smith*, 451 U.S. 454, 465  
10 (1981).

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15 *J. Claim Thirteen – Ineffective Assistance of Counsel*

16 The Sixth Amendment guarantees "the right to effective assistance of  
17 counsel." *McMann v. Richardson*, 397 U.S. 759, 771 n. 14 (1970). A petitioner  
18 claiming ineffective assistance of counsel must allege specific facts which, if proved,  
19 would demonstrate that 1) counsel's actions were "outside the wide range of  
20 professionally competent assistance," and 2) "there is a reasonable probability that,  
21 but for counsel's unprofessional errors, the result of the proceeding would have been  
22 different." *Strickland v. Washington*, 466 U.S. 668, 687-690 (1984). Mere  
23 conclusory allegations do not prove that counsel was ineffective. *See Shah v. United*  
24 *States*, 878 F.2d 1156, 1161 (9th Cir. 1989). Petitioner fails to state a claim for  
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1 ineffective assistance by failing to allege facts sufficient to meet either the  
2 “performance” or “prejudice” standard, and the district court may summarily dismiss  
3 his claim. Stated differently, “[t]o be entitled to habeas relief due to the  
4 ineffectiveness of defense counsel, petitioner must establish both that counsel's  
5 performance was deficient and that the deficiencies prejudiced the defense.” *Medina*  
6 *v. Barnes*, 71 F.3d 636, 368 (9th Cir. 1995) (*quoting Strickland*, 466 U.S. at 687,  
7 689). The court evaluates “counsel's performance from [their] perspective at the time  
8 of that performance, considered *in light of all the circumstances*, and we indulge a  
9 strong presumption that counsel's conduct fell within the ‘wide range of reasonable  
10 professional assistance.’ ” *Medina*, 71 F.3d at 368 (emphasis added).

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12 Petitioner’s Motion makes numerous vague and conclusory allegations  
13 against *all* of his court-appointed attorneys, claiming they violated his right to  
14 effective assistance of counsel. Specifically, he alleges:

- 15 • Robert Fisher “tried to steal exculpatory evidence which was hidden with the  
16 North Idaho attorney.” (ECF No. 361-1 at 14).
- 17 • Bruce Johnson (appellate counsel) refused to “present the defense of his client’s  
18 choice,” “inventing accusations of his own.” (ECF No. 361 at 14).
- 19 • Terence Ryan failed to advise the Defendant to remain silent during his interview  
20 because “if he misspoke, the information could be used against him in Court.”  
21 (ECF No. 361-1 at 15).

- 1 • Frank Cikutovich 1) failed to object or block the evidence of Dr. Cloninger; 2)  
2 failed to advise the Defendant to remain silent (ECF No. 361-1 at 15); 3) refused  
3 to comply with a directive from the Defendant to “read the complaint of the  
4 Interlocutory appeal of 20 December 2011, which accused multiple Court  
5 officers of inappropriate conduct.”; 4) failed to raise an objection to evidence  
6 being included in the record (ECF No. 361 at 19); 5) failed to raise an objection  
7 to the deprivation of fundamental rights (ECF No. 361 at 19-21); 6) called a  
8 witness during the competency hearing who failed to meet the standards of  
9 Federal Rule of Evidence 702; 7) failed to object to the involuntary  
10 administration of medication and pretrial detention in excess of 70 days (ECF  
11 No. 361 at 20); and 8) failed to raise an objection to an unconstitutional statute.  
12 • Jeffrey Finer (appellate counsel) 1) “hijacked the appeal, refusing to present the  
13 defense the Defendant desired, authored and directed to be presented to the  
14 Court.” (ECF No. 361-1 at 18); and 2) involuntarily waived Defendant’s right to  
15 speedy trial by telling the Ninth Circuit at oral argument that “the Defendant had  
16 waived his right to speedy trial.”  
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23 Viewed against the record as a whole, Petitioner’s conclusory allegations of  
24 ineffective assistance of counsel warrant summary dismissal. Petitioner’s claims are  
25 meritless as they are premised upon his misguided belief that he had a right to dictate  
26 trial strategy. The Motion and the lengthy files and records of the case conclusively  
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1 show that cannot satisfy either the “performance” or “prejudice” prong and surmount  
2 *Strickland*’s high bar.

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4 *K. Claim Fourteen - Remedy*

5 Petitioner’s last asserted ground for relief does not state a claim but suggests  
6 a remedy (retrial) if he were successful on his § 2255 Motion. As the court’s initial  
7 screening process summarily dismisses all claims asserted in the §2255 Motion, the  
8 claim regarding available remedies is moot.  
9

10 **IV. CONCLUSION AND ORDER**  
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12 Based on the foregoing, IT IS HEREBY ORDERED that Petitioner’s Motion  
13 to Vacate, Set Aside or Correct Sentence (**ECF No. 361**) pursuant to § 2255 is  
14 **DENIED**. The court also DECLINES to issue a certificate of appealability because  
15 the court finds that reasonable jurists would not find the court’s determination of the  
16 Motion debatable or wrong, or that the issues presented are deserving of  
17 encouragement to proceed further. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000);  
18 *Allen v. Ornoski*, 435 F.3d 946, 951 (9th Cir. 2006). Petitioner is advised that he  
19 may still request a certificate of appealability from the Ninth Circuit Court of  
20 Appeals, pursuant to Federal Rule of Appellate Procedure 22(b) and Local Ninth  
21 Circuit Rule 22-1. To do so, he must file a timely notice of appeal. If Petitioner files  
22 a timely notice of appeal, and not until such time, the Clerk of Court shall forward a  
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1 copy of the notice of appeal, together with this Order, to the Ninth Circuit Court of  
2 Appeals.

3 DATED this 1st day of June, 2017.

4 *s/Lonny R. Suko*

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6 LONNY R. SUKO  
7 SENIOR U.S. DISTRICT JUDGE  
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